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IN THE

SUPREME COURT OF THE UNITED STATES.

SOUTHWESTERN BELL TELEPHONE COMPANY, a Corporation,
Appellant,
v.
CARRIE C. LEE,
Appellee.
No. 299.

APPELLANT'S BRIEF
IN OPPOSITION TO MOTION TO DISMISS AND IN SUPPORT OF THE JURISDICTION OF THIS COURT.

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I. THE HISTORICAL ORIGIN OF THIS CASE.

In running its telephone business in Arkansas, the appellant (which will hereafter often be called the company) makes its services available at all its exchanges for the payment of a flat monthly charge. As in all other pricing systems the appellant found need for defining the quantity of service that would be provided for the flat rate.

The amount of service that the appellant offers to give for the flat price is defined (as the Arkansas Utilities Act requires) by a rule and regulation filed with the Department of Public Utilities, as the regulatory commission is there called. The particular rule that accomplishes this essential purpose in this instance is known as paragraph V-C of the section on "Rules and Regulations Applying to All Subscribers' Contracts" in the appellant's "General Exchange Tariff" filed with the Department in obedience to the statutory injunction. This paragraph reads:

> "USE OF CUSTOMER SERVICE—Customer telephone service, as distinguished from public and semi-public telephone service, is furnished only for use by the customer, his family, employees or business associates, or persons residing in the customer's household, except as the use of the service may be extended to joint users. The Telephone Company has the right to refuse to install customer service or to permit such service to remain on premises of a public or semi-public character when the instrument is so located that the public in general or patrons of the customer may make use of the service. At such locations, however, customer service may be installed, provided the instrument is so located that it is not accessible for public use."

This rule, it may be noted, in reality is comprised of two rules. The first confines the use of the service to be furnished for the flat rate to the customer, his family, his employees and business associates; the second provides a practical means by which the company may reasonably assure itself that the use of the service is so confined. In a sense the second part of the rule, permitting the company to locate the flat rate telephones in places inaccessible to the public generally, is superfluous, although it has been found helpful by the company in dealings with its customers. The restriction of the service to the specified

users is the true rule, and if the company is persuaded that the customer will in fact observe the restriction, and is constantly in position to prevent the unauthorized use of the service, then no occasion would exist for requiring an inaccessible location of the instrument. On the other hand, a compliance with the company's request for an inaccessible location would in no sense constitute a compliance with the essential rule of confinement of use. A customer might well make an inaccessible installation of a telephone in a back room and then flagrantly violate the company's tariff rule by a general invitation of the public to feel free to make unlimited use of the concealed telephone.

The need for this rule defining the amount of service that will be given for the flat rate is adequately, though perhaps not fully, explained in the report and order of the Department of Public Utilities incorporated in this record (Tr. II, 19-32).

While the company recognizes, of course, that variations of use will occur between different customers, by the inevitable functioning of averages, the company rather certainly knows what it is selling for the flat rate when the rule of paragraph V-C is applied. The variations are inherent in the flat rate system which up to now has been found to be the most desirable for the appellant's telephone system throughout five states. The rule, however, establishes a limit to the variations which in its absence would be greater.

The flat rates in the telephone business are in the same category as the pricing systems exemplified by "all you can eat for 50 cents," or "all the lemonade you can drink for a nickel." In each case the "you" means one person—not the whole world or any collective part of it. The same would be true as to flat rates for water. Mr. Jones contracts with the water company for water supply at his home at the fixed rate of $2.00 per month. With Mr. Jones'

permission, his next-door neighbor, Mr. Brown, connects his hose to Mr. Jones' hydrant, and makes use of all the water he wants. Of course, the water company would not be expected to continue to supply at the flat rate of $2.00 per month all the water used by both. And so it is in the telephone business—hence the rule.

Now the company has long known that some of its customers in trade, such as the plaintiff, wanted to have a telephone that their own customers or passersby might use, and the company has also wanted to make some provision for the telephone needs of those who have no regular service and those who are on the streets. In order to meet this demand, the company provides what it calls semi-public service, the use of which is not affected by the rule of confinement, V-C. The traditional semi-public service is the familiar coin-box service—measured service —which is paid for as it is used—by the public or by the customer, as the case may be, at a nickel a call. In Fayetteville, however, where this case originated, an additional, and somewhat unusual, form of semi-public service is offered. It is furnished at the filed tariff flat rate of $7.00 a month ($10.50, at the time of the origin of this case) as compared with the flat rate for customer service, to which the rule applies, of $3.50 a month. This semi-public flat rate has the effect of withdrawing the rule of confinement in return for the larger stipend. In that kind of service the subscriber is at liberty to have his instrument located anywhere, and to permit unlimited use of the service by anyone who happens in. The desire for this type of service seems to be based on some notion that it possesses advertising value—that it fetches in trade or potential trade.

The difficulties of enforcing this rule, with the infractions occurring on the customer's premises, are obvious, of course, and for some time the company was somewhat

neglectful of its enforcement. Several years ago, however, enforcement activities were renewed, and resistance was encountered in some quarters owing, as the company believes, to a lack of understanding of the need for the rule. This unpopularity eventually resulted in the passage of an ordinance (under the dual form of regulation obtaining in Arkansas) having the effect of doing away with the rule at Fort Smith. This ordinance was taken by the company before the Department of Public Utilities for review under the statutory procedure, and after hearing the Department ordered the company to reinstate the rule and to enforce it vigorously throughout the state (Tr. II, 19-32). Upon appeal ultimately to the Supreme Court of Arkansas, the Department's order was declared to have been validly made within the Department's statutory authority (**City of Fort Smith v. Department of Public Utilities**, 195 Ark. 513, 113 S. W. [2d] 100).

The company's efforts to enforce the rule at Fayetteville in obedience to the Department's order resulted in another ordinance—this time to the effect that service of the semi-public character must be given at a flat rate, rather than a measured rate, if the customer insisted upon it. The company thereupon established a charge for this type of service—flat rate semi-public service—and filed its schedules containing the new rate with the Department, as the statute requires.

So much for the history leading up to this case which the appellant believes should contribute to a full understanding.

II. THE NATURE OF THIS CASE.

The plaintiff asked the appellant to furnish her with telephone service at her eating house on the campus of Arkansas University at Fayetteville. She wanted to pay the usual flat rate for customer service, but she advised

the company, upon its inquiry, that she would permit, and would not refuse, the use of her service by her patrons and other visitors at her place of business (Tr. II, 4a, 5, 7). She refused, in other words, to comply with the appellant's rule applying to customer service, and in doing so the effect of her request was for semi-public service, to which the rule does not apply, at the lower rate for customer service. The company refused this request, and the plaintiff went without telephone service when she rejected the offers of other types of service at the established tariff rates.

The plaintiff then brought this lawsuit to recover the penalties provided by section 14261 of Pope's Digest of the laws of Arkansas, reading:

> "DISCRIMINATION—PENALTY. Every telephone company doing business in this State and engaged in a general telephone business shall supply all applicants for telephone connection and facilities, without discrimination or partiality, within ten days after written demand therefor; provided, such applicants comply or offer to comply with the reasonable regulations of the company, and no such company shall impose any condition or restriction upon any such applicant that are (is) not imposed impartially upon all persons or companies in like situations; nor shall such company discriminate against any individual or company engaged in lawful business by requiring as condition for furnishing such facilities that they shall not be used in the business of the applicant, or otherwise, under penalty of one hundred dollars and five dollars per day for each day from the expiration of such notice until said demand is complied with or suit is instituted for failure to comply with such demand, for such discrimination, after compliance or offer to comply with the reasonable regulations and time to furnish the same has elapsed, to be recovered by the applicant whose application is so neglected or refused * * *."

The plaintiff contended that a discrimination was practiced against her by the company's refusal to give her the service she wanted, at the rate she wanted to pay, because other customers of the company were receiving such a service at such a rate. Her contention, of course, was the equivalent of a contention that she should not be held to a compliance with the rule because she could produce some other customers of the appellant who were violating the rule, and who were, ipso facto, violating their contracts with the company.

The penalties of the statute were assessed against the appellant for its refusal to meet the plaintiff's demand, although the appellant was actually obliged by law to do as it did. In common with all other regulatory acts that the appellant knows anything about, the Arkansas Utilities Act requires all rates, and all rules and regulations affecting the rates, to be filed with the Department of Public Utilities, and under the pains of the penalities elsewhere provided in the act, requires that the rates so filed shall not be departed from. The appellant, accordingly, had no alternative but to charge the $10.50 flat rate which it had on file with the Department in its tariff for the semi-public service which the plaintiff was demanding. Furthermore, under the provisions of the Utilities Act the appellant was not at liberty to disregard the order of the Department requiring it to enforce its rule confining the use of customer service.

All through the case, at every stage, the plaintiff readily acknowledged that the reasonableness of the rule was not under attack, and with a welcomed frankness her counsel repeat this acknowledgment in their statement opposing the jurisdiction of this court (p. 4). It is not surprising, therefore, that no evidence concerning the reasonableness of the rule was presented at the trial. The plaintiff apparently agreed, in the appellant's opinion, that under the

statutes of Arkansas the reasonableness of the rule was not subject to collateral attack.

But in spite of the absence of any issue respecting the subject between the parties, and in spite of the absence of any evidence, the supreme court gave its attention to the rule and declared it unreasonable and unenforceable, and by a divided court affirmed a judgment for penalties for that very reason. Such an unprecedented action is so much at odds with the accepted notions of fair play that it is bound to be offensive to the Fourteenth Amendment to the federal Constitution—and this result comes about in the ways we shall now undertake to demonstrate.

III. THE CONSTITUTIONAL QUESTIONS IN THIS CASE UNDER AN ADJUDICATION OF UNREASONABLENESS OF THE RULE.

1. The Denial of Due Process in a Legislative Proceeding.

From beginning to end the opinion and decision of the Arkansas court operate to take the appellant's property and to deny due process of law to the appellant. Indeed, even the court's approach to the problem so operates contrary to the Constitution; and this subject is as good a one as any to begin with, even though it may not furnish the most shocking example of the unconstitutional hardships imposed upon the appellant. Briefly, the court approached a solution of the case by way of performing a legislative act, not a judicial act—by declaring the appellant's rule unreasonable—and by thus issuing an order establishing a future rate for a public utility service. Under the circumstances of this case, and upon a consideration of the statutes of Arkansas, this action of the court denies the appellant due process of law.

The regulation of the rates of public utilities is a legis-

native function, even when performed by the courts (**Southwestern Bell Telephone Company v. Oklahoma**, 303 U. S. 206; **Prentis v. Atl. Coast Line Ry. Co.**, 211 U. S. 210). The court's decision that the appellant's rule, V-C, defining the amount of service to be provided for the established rate, was unreasonable (and therefore unenforceable) necessarily constituted a rate order. Every rule affecting a rate would appear inevitably to be a part of the rate, and surely the rule here concerned was a part of the rate. The rule designated the class of persons—the customer, his family, and business associates—who were entitled to receive the customer service for the applicable customer rate. In declaring the rule unreasonable, the court enlarged to infinity the class of persons who might employ the service, and thus increased the amount of service which must be given for the same rate. The enlargement of the service that must be provided for any given rate is the precise equivalent of the reduction of the rate for any given service. Furthermore, by rubbing out the application of the rule to customer service, the court automatically reduces the appellant's flat rate for semi-public service down to the lower customer rate. The applicability of the rule to the customer service and not to the semi-public service is the only distinction between the two classes of service.

The Arkansas statute, in its definition of a "rate" also recognizes that a rule affecting a rate is a part of the rate.

> "The term 'rate' when used in this Act, means and includes every compensation, charge, fare, toll, rental and classification or any of them, demanded, observed, charged or collected by any public utility for any service, products, or commodity offered by it as such public utility to the public, **and any rules, regulations, practices or contracts** affecting any such compensation, charge, fare, toll, rental, or classification" [Pope's Digest, section 2064 (e)].

The legislative regulatory power nowadays is customarily delegated to administrative commissions with provision for judicial review of the lawfulness of their orders by direct proceedings in the courts. This is the procedure established by the Arkansas Utilities Act (Pope's Digest, section 2064 et seq.). The legislative power is delegated to the Department of Public Utilities, and the courts are invested with jurisdiction in a direct proceeding to determine whether the Department "has regularly pursued its authority" [section 2097 (d)]. The statute (clearly enough, it would seem) does not delegate any legislative authority to the courts, but confines their jurisdiction to a simple yea or nay answer to the question of the Department's order having been reached in accordance with its statutory authority.

As we have said earlier, the jurisdiction of the Department legislatively to determine the reasonableness of the appellant's rule was invoked some two years before the case at bar was brought, and, after hearing, the Department confirmed its reasonableness and ordered the rule enforced. Upon appeal, eventually reaching the Supreme Court of Arkansas, that court sustained the order of the Department as validly made in its legislative capacity. City of Fort Smith case, supra. The court in that case, however, was not concerned with the reasonableness of the rule. The appellant there contended only that the Department had no authority whatever in the premises to issue any order, and did not contend that the order which was issued was unreasonable and therefore beyond the Department's statutory authority, which is limited to the prescription of such rules only as are reasonable.

Under the circumstances, in the case at bar, the action of the Supreme Court of Arkansas in adjudging the appellant's rule to be unreasonable effects a deprivation of appellant's property without due process of law contrary to the Fourteenth Amendment in each of two ways:

(1) There is no statute in Arkansas empowering the court to act legislatively, as we have demonstrated the court did act. The Assembly has never delegated any such authority to the court; and indeed it would appear to have been prevented from doing so by Article IV, section 1 of the Constitution of Arkansas, pertaining to the separation of powers. Despite, then, the want of any delegation of legislative authority, the court essays a legislative act, dubs it a judgment, and employs its judicial power of execution of its judgments to enforce its spurious legislative order. This procedure so offends the traditional concepts of the orderly processes of law as to constitute a taking without due process. Due process of law, in its simplest meaning, cannot embrace the unexpected promulgation of a legislative order by a judicial tribunal without delegated authority, followed by the judicial execution of the legislative order against the property of the appellant.

(2) If it be assumed that the Supreme Court of Arkansas, by some undiscoverable statute, does possess legislative power to regulate ultility rates, then the manner of the exercise of that power by the court in this case also denies the appellant due process of law. The appellant was afforded no notice of attack, even the forbidden collateral attack (**Texas etc. R. Co. v. Abilene Cotton Oil Co.**, 240 U. S. 426), on the reasonableness of its rule, and was afforded no hearing thereon. The Arkansas court in its own opinion (140 S. W. [2d] 134 l. c.) conceded that the issue of reasonableness had not been tendered at the trial. The court said:

> "We are by no means forgetful that appellant has argued the issues upon this appeal solely upon matters or questions of fact, asserting and assuming as they apparently have a right so to do, under the record in this case, that because the reasonableness

of the foregoing rule was not questioned by appellee, it may not properly be so considered in this litigation. This is so contended on account of the fact that both in the Lee case and in the Hanna case, counsel for the appellees have argued that the cases may be settled upon questions of fact duly presented without a consideration or determination on the part of this court of the reasonableness of the rule offered as a part of appellant's defense.

"Ordinarily we would feel ourselves bound by such limitations as the plaintiffs themselves may have felt impelled to recognize in the decision of any rights they may have asserted in any matter wherein those rights were purely personal or individual.

"In this matter, however, there are more than individual rights involved. The telephone company is a public service utility, having a monopoly of the service it renders in Fayetteville, where these suits originated, and whatever rules it may announce must be considered not as an all-controlling force, or to possess the nature of a statutory enactment, but as regulatory, merely, of the business of the corporation, and that such regulation must be considered as coupled inseparably, always, with the public interest. Therefore, if rules are not reasonable they may not be regarded as enforcible or as affecting the rights of those who deal with the telephone company."

The plaintiff also, with consistent frankness, even through her motion to dismiss here, has concurred in the appellant's charge that the issue of reasonableness was never raised.

Consequently, of course, no evidence of the reasonableness of the rule was ever offered, and none was before the court when it surprisingly concluded that the rule was unreasonable and that more service ought to be given for the rate that was established to apply to a restricted service.

The Supreme Court of Arkansas, accordingly, without

notice, without hearing, and without evidence, annulled the appellant's rule, which had been held reasonable and ordered enforced by the valid order of the regulatory Department. If any statute had ever authorized such an action, that statute would be void as in contravention of the Fourteenth Amendment, and a fortiori such an action without the support of delegated authority possesses the same vice in an aggravated degree.

Due process requires notice, and hearing, and evidence in the legislative, regulatory process.

Chicago etc. R. Co. v. Minnesota, 134 U. S. 418;
San Diego Land Co. v. National City, 174 U. S. 739;
West Ohio Gas Co. v. Comm., 294 U. S. 63;
Ohio Bell Teleph. Co. v. Comm., 301 U. S. 292.

2. The Denial of Due Process in a Judicial Proceeding.

Even if the action of the Arkansas court in declaring the rule unreasonable could in some way be regarded as a judicial, rather than a legislative act, the denial of due process is simply converted from a legislative denial to the equally forbidden judicial denial. The rights guaranteed by the Constitution are as much protected against a taking by an erratic judicial process as by a legislative process. (See **Abbott v. Tacoma Bank of Commerce**, 175 U. S. 409, in which it is said, "It is true • • • that a state may not by any of its agencies, legislative, judicial, or executive, disregard the prohibitions of that amendment"—and the cases hereafter cited.)

Notice and hearing, which were here lacking on the issue of reasonableness of the rule, are as essential in the judicial process as in the delegated legislative process which we have discussed above. (See **American Land Co. v. Zeiss**, 219 U. S. 47; **Twining v. New Jersey**, 211 U. S. 78).

Evidence, also, to support the conclusion reached is

both wholly essential and wholly lacking (**Carlson v. Washington,** 234 U. S. 103, 223 U. S. 573; **Cedar Rapids Gas Light Co. v. Cedar Rapids,** 223 U. S. 655; **Southern Pac. R. Co. v. Schuyler,** 227 U. S. 601; **Fiske v. Kansas,** 274 U. S. 380).

3. The Denial of Due Process in Penalizing Under One Statute for Conduct Required by Another.

Perhaps the most shockingly unconstitutional result of the declaration of unreasonableness of the rule is the imposition of penalties against the appellant under one statute because of the compliance with another.

The very conduct of the appellant which the court, through declaring the rule unreasonable, has used as the excuse for inflicting penalties upon the appellant was actually twice enjoined upon the appellant by the Utilities Act—and in no uncertain terms.

As we have said in our preliminary explanation of this case, the appellant had incorporated its rate of $10.50 for flat rate semi-public service in its tariffs for Fayetteville which were filed with the Department of Public Utilities, as the statute requires, and which were received in evidence in this case. When the plaintiff declined to confine the use of the service she was requesting in accordance with the rule applying to customer service, her demand was necessarily converted into one for the semi-public class of service to which the rule does not apply. Under the Utilities Act the appellant, in these circumstances, was not at liberty to do anything other than it did; namely, to refuse the demand for semi-public service at the $3.50 rate for customer service, and to offer the service at the applicable semi-public rate of $10.50 contained in the filed tariff, which was in turn refused by the plaintiff.

The section of the Utilities Act requiring this behavior of the appellant reads:

"No public utility shall directly or indirectly, by any device whatsoever, charge, demand, collect or receive, from any person, a greater or less compensation for any service rendered, or to be rendered by such public utility, than that prescribed in the schedules of such public utility, applicable thereto then filed in the manner provided in this Act, nor shall any person receive or accept any service from a public utlity for a compensation greater or less than that prescribed in such schedules" (Pope's Digest, section 2075).

Furthermore, as we have also said before, the appellant was obliged to apply its rule by an existing formal order of the Department which the Arkansas Court in the Fort Smith case had already held to have been validly promulgated within the Department's proper authority. This order has never been set aside to this day, and it probably never will be if the court ever gives its attention to the evidence justifying the rule which may some day be before it, but which was not in this case.

The consequences, then, of a compliance by the appellant with the plaintiff's demand for service would have been a two-fold violation of Utilities Act—a violation of the statute forbidding any departure from the filed tariff rates, and a violation of the Department's order which the appellant was bound to obey. Both of these violations would have subjected the appellant to the criminal penalties of the Utilities Act which are imposed by Pope's Digest, section 2121, as follows:

"(b) Any person or corporation which violates any provision of this Act or fails to comply with every lawful order, decision, direction, rule or regulation made or prescribed by the Department, or any part or provision thereof, shall be deemed guilty of a misdemeanor and upon conviction, subject to a penalty

of not less than $100 nor more than $1,000 for
such offense."

The due process clause, of course, with its more ex
meaning of fundamental justice and its simpler mea
of fair play, can never tolerate a situation where pena
are imposed under one statute because of conduct requ
by another. That is the appellant's anomalous and i
tricable situation in this case. It elected to comply
the Utilities Act, and for doing so, it was thereupon
ished under the penalty statute. If it had elected to a
the latter result, it would have become immediately
ject to the punishments of the Utilities Act.

This case is more incongruous, more aggravated,
far harsher in result (largely owing to the presence
of the Utilities Act) than the earlier case under the Ar
sas penalty statute which this court reversed for unco
tutionality by a unanimous decision. Otherwise the
cases are virtually dead parallels. In **Southwe**
Tel. and Tel. Co. v. Danaher, 238 U. S. 482, appellant
enforcing a rule that applicants for new service sh
pay for service rendered in the past before the new se
was connected. In a suit for penalties under the p
cessor of Pope's Digest, Sec. 14261, arising out of
enforcement of this rule by the telephone company,
rule was held unreasonable by the Arkansas Court (**So**
western Tel. & Tel. Co. v. Danaher, 102 Ark. 547, 144 S
925), and penalties were allowed against the telep
company. The telephone company thereupon appeale
the United States Supreme Court on the ground th
Federal question was involved, since the constru
placed upon the penalty statute by the Arkansas c
was in conflict with the due process clause of the F
teenth Amendment to the Constitution of the U
States, because the company was penalized for enfo
a rule which it had every reason to think was reason

In a unanimous opinion reversing the judgment of the Arkansas Court, this Court said:

> "Of course, it is not open to us to revise the construction placed upon the statute by the state court, but it is open to us to determine whether the application made of the statute in that instance was so arbitrary as to contravene the fundamental principles of justice which the constitutional guaranty of due process of law is intended to preserve. What, then, are the circumstances in the light of which this question must be determined?
>
> "Regulations like that which the telephone company applied to the plaintiff were not declared unreasonable by the statute. It left that matter entirely open and to be determined according to general principles of law. The state court did not hold otherwise. The regulation, according to the rejected proof, was adopted in good faith, had been uniformly and impartially enforced for many years, and was impartially applied in this instance. There had been no decision in the state holding or indicating that it was unreasonable. Like regulations often had been pronounced reasonable and valid in other jurisdictions and while some differences of opinion upon the subject were disclosed in reported decisions, the weight of authority was on that side. * * *
>
> "If it be assumed that the state legislature could have declared such a regulation unreasonable, the fact remains that it did not do so, but left the matter where the company was well justified in regarding the regulation as reasonable and in acting on that belief. And if it be assumed that the company should have known that the Supreme Court of the state, in the exercise of its judicial power, might hold the regulation unreasonable, even though the prevailing view elsewhere was otherwise, the question remains whether, in the circumstances, penalties aggregating $6,300, could be imposed without departing from the fundamental principles of justice embraced in the recognized conception of due process of law. In our

opinion the question must be answered in the negative. There was no intentional wrongdoing, no departure from any prescribed or known standard of action, and no reckless conduct. Some regulation established a mode of inducing prompt payment of the monthly rentals was necessary. It is not as if the company had been free to act or not, as it chose. It was engaged in a public service which could not be neglected. The protection of its own revenues and justice to its paying patrons required that something be done. It acted by adopting the regulation and then impartially enforcing it. There was no mode of judicially testing the regulation's reasonableness in advance of acting under it, and, as we have seen, it had the support of repeated adjudications in other jurisdictions. In these circumstances to inflict upon the company penalties aggregating $6,300 was so plainly arbitrary and oppressive as to be nothing short of a taking of its property without due process of law" (citing cases).

Thus, according to the unequivocal language of this court, it is obvious that in the instant case the Arkansas Court, in penalizing appellant for acting pursuant to a rule thought to be reasonable, has deprived appellant of its property without due process of law, and that, in order to do so, the Court employed that same line of faulty and injudicious reasoning which was so severely criticized in the **Danaher** case.

Realizing, no doubt, that the **Danaher** case is almost a dead parallel for the instant case, and that its doctrine disposes of the question of jurisdiction herein, appellee attempts to distinguish the two on the ground that when the **Danaher** case arose the predecessor of Section 14261, supra, provided for penalties of $100.00 per day instead of $5.00 per day as now provided. Appellant is unaware of any distinction, so far as this Court's jurisdiction is concerned, between taking its property without due proc-

ess of law at the rate of $100.00 per day and at the rate of $5.00 per day. Certainly, the Constitution itself does not say that while $100.00 worth of property may not be taken, $5.00 worth may be.

IV. THE BASIS OF DECISION IN THIS CASE IS UNREASONABLENESS OF THE RULE.

While, as will appear hereafter, federal questions under the Fourteenth Amendment, reviewable by this court, will remain in this case even if the ground of the decision by the Arkansas Court was not the unreasonableness of the rule, the appellee's assertion, in an effort to avoid the plain implications of the Danaher case, that such was not the rationale of the decision, but was mere dictum, is hardly allowable, as the following quotations from the Court's opinion will demonstrate:

> "This is not the first time that we have seen this rule, but it is the first occasion on which the requirements of the rule and the reasonableness thereof have been presented for our consideration. **City of Fort Smith v. Department of Public Utilities**, 195 Ark. 513, 518, 113 S. W. (2d) 100" (Tr. I, 17).

* * * * * * *

> "The agents for the telephone company by their evidence argued that the standard type service, when installed is for the sole use of the subscriber, whom they call a customer, and the members of his family and his employees, or members of the business organization. They argue also that if such customer permits someone else to use the telephone he violates a contract made for the installation of the instrument. Such is the contention of the appellant company and because that condition was not upheld by the trial court, the appeal in these two cases is for the purpose of setting aside and overturning the judgments of the

trial court. If under all the circumstances the contention is reasonable, based on a fair and natural classification of those who subscribed for and used telephones, we think it becomes our duty to uphold such contention as an established rule of the company, but, if, on the other hand, the distinction or so-called classification is artificial, arbitrary and without any sound basis in fact, the law will not support it" (Tr. I, 24, 25).

"* * * Therefore we think that the contention of the telephone company and its local agents that each telephone is located for the sole and exclusive use of the subscriber, the members of his family, and his employees, unreasonable, inasmuch as it fails to give consideration to the physical properties or mechanics of the telephone as well as the usual and ordinary controlling purposes of those who install such instruments in their places of business" (Tr. I, 25).

This quoted statement is followed by the Court's reasons therefor, which purport to show that such a rule is unfair, impractical and unreasonable, due to the nature of the telephone business. The Court sums up as follows:

"So it must appear, we think, that the classification intended to be made by the telephone company, or its agents, is without a sound basis in fact or reason" (Tr. I, 27).

If there could be any doubt left that the decision herein rests solely on the ground that the rule sought to be enforced was unreasonable, that doubt is removed and the Court, in its discussion, at pages 921-2, supra, of **Southwestern Tel. & Tel. Co. v. Sharp & White**, 118 Ark. 541, 177 S. W. 25, makes itself absolutely clear that such holding is the basis of its decision, where it stated that the **Sharp & White** case holds:

"* * * the telephone company has the right to make all **reasonable** rules and regulations for the oper-

ation and control of its business, and those who deal with it must comply with such **reasonable** rules and regulations, but this announcement may not be taken as an unlimited authority on the part of the telephone company to announce a rule, **the effect of which would result in reducing, impairing, or rendering an inferior service** with the same appliances and facilities used in rendering the standard or regular service, and thereby defeat the effect of regulatory statutes" (Tr. I, 27-28). (Emphasis ours.)

Thus it is clear that the only manner in which the Court even attempts to distinguish the **Sharp & White** case from the instant case is that the rule in the **Sharp & White** case was **reasonable**, whereas the rule sought to be enforced in the instant case was held by the court to be **unreasonable**.

V. THE CONSTITUTIONAL QUESTIONS IN THIS CASE ASIDE FROM THE ADJUDICATION OF UNREASONABLENESS OF THE RULE.

1. The Court's Various Interpretations of the Penalty Statute Render It Unconstitutional in Application.

(a) By withdrawing the need for compliance with the rule.

If the basis of the decision of the Arkansas Court had not been that the rule was unreasonable, whatever other basis which might have been adopted would have led similarly to unconstitutional results, and the federal questions would have remained present in the case.

For example, if it could be said (as the appellee does) that the court did not declare the rule unreasonable and decide the case from that point of view, then it must be said that the court so construed and applied the penalty statute as to place the appellant in the same offensive predicament, as earlier described, of suffering under one

statute for complying with another. If the court leaves the rule (as it could scarcely be said to do) with the finding of reasonableness by the Department of Public Utilities, the court in affirming the plaintiff's judgment necessarily so interprets the penalty statute as to read out of it the plain requirement that the plaintiff, in order to maintain her case, must have offered to comply with the rule; because it has never been contended that she offered to comply with the basic rule limiting the use of her demanded flat rate customer service to herself, her family, and her business associates. While it was found, under disputed facts here precluded, that the plaintiff offered to comply with the subordinate rule respecting location of the instrument, it was never suggested that she offered to comply with the primary rule of restriction of her service. In her own testimony she said both that she wanted the service for use by "everybody" (Tr. II, 5) and that she would deny the use to nobody who might ask for it (Tr. II, 5).

With the statute so interpreted as to wipe out the requirement of compliance with the rule which we are now assuming was not declared unreasonable, we are returned to the doctrine of the **Danaher** case. The oppressive, unjust hardship imposed against the appellant by the application of the statute as then interpreted—an interpretation that allows of the infliction of penalties for conduct required by another statute—brings this case as surely within the principles of the **Danaher** case as the unexpected declaration of the unreasonableness of the rule.

The appellant, of course, does not contend that the penalty statute is unconstitutional per se, or in every application; but the appellant would so contend if the statute did not contain the requirement for compliance with the rules which the court is now interpreting out of it. As the section is now written, it would be easily reconcilable

with the Utilities Act so that the unconstitutional effect here complained of would be avoided simply by interpreting the "reasonable rules" with which compliance is required as the rules on file with the Department as required by the regulatory law. But the court's interpretation is quite otherwise, if it interpreted the section at all, and it is this interpretation, and the application as interpreted, that is repugnant to the restrictions of the federal constitution.

This court, of course, takes jurisdiction to determine the constitutional questions as readily when the complaint relates to construction and application of a statute as when it relates to an unalterable invalidity of a statute under all circumstances. For authority on this proposition, **Ward v. Krinsky,** 259 U. S. 503, may be added to the **Danaher** case.

(b) **By penalizing appellant for acts of its customers.**

Following on, if we continue to assume that the rule was not declared unreasonable (as we can't), and if we further assume (as again we can't) that the court would not have needed to interpret the penalty statute in the way of reading out the necessity for compliance with the rule, the decision would even so continue to work a denial of due process.

At the trial the plaintiff produced several witnesses who testified that they permitted anybody to use their telephone service which was furnished at the customer flat rate. No evidence was ever produced that the appellant ever knew of this practice of the witnesses who were put on in an attempt to prove that the appellant had discriminated in their favor against the plaintiff. All that their evidence proved, of course, was that without the knowledge of the company they were violating the rule in repudiation of their contracts with the company which

bound them to the observance of all the rules. All of the presumptions of law are in favor of compliance with the law and of performance rather than violation of compacts. The appellant was entitled to rely upon its customers to perform their contracts, and to observe the rules; and to interpret the penalty statute as warranting the infliction of penalties for the unknown violations of the rule by the appellant's customers, which necessarily occurred on the customers' own premises, is simply to add to the other denials of due process. Under this interpretation it would be impossible for appellant to avoid penalties by reason of the derelictions of its customers except by forsaking its constitutional right in the management of its business to establish reasonable classifications, reasonable rules and regulations, and reasonable rates.

There are hints, both in the court's opinion and in the appellee's statement, that the appellant might have known of these violations of its rule because the telephones had been in service in some instances for several years; but the patent fact is that because the appellant installed and maintained a telephone at any particular location is no reason to believe that the company knew what use was being made of it, or what use of it was being permitted by the customer. In this connection it ought to be observed that the company has many rules which it depends upon its customers to comply with, but whose violations occur on the customers' premises and are seldom apprehended. A single example of this (out of many possible illustrations) is the rule against the use of profanity and kindred language on the telephone. Under the interpretation of the penalty statute in the decision in this case, the appellant would suffer penalties for refusing telephone service to an applicant who advised that he wanted it almost exclusively for the purpose of expressing himself in obscenities, blasphemies, and profanities, if he could

produce someone else who would testify that unknown to the company he had sometimes engaged in little cussing on the telephone. It would appear to be perfectly plain that that analogous case could not stand the test of the Fourteenth Amendment. And neither can this one.

(c) **By requiring criminal conduct of appellant.**

Finally, even if (contrary to the record), the appellant had deliberately violated the Utilities Act in consciously permitting some customers to receive service at less than tariff rates, and in consciously permitting them, in disobedience to the Department's order, to employ their service in disregard of the rule, the appellant would be prevented by the decision herein from reforming its criminal behavior and complying with the Act thenceforth. It would be forced to continue to violate the Act in order to avoid the consequences of the penalty statute. It would be forced to engage in a crime for the plaintiff's gain because it had engaged in a crime for the benefit of someone else. It would be compelled to multiply its criminal offenses under the Utilities Act. It has probably never hitherto been suspected that a statute could stand the test of the Fourteenth Amendment when its application would require the commission of criminal offenses because similar criminal offenses had been committed earlier.

VI. THE FEDERAL QUESTIONS WERE PRESENTED IN DUE TIME.

Since there was no decision in this case, the effect of which would be to deny to appellant the equal protection of the law and to take its property without due process of law until the Supreme Court of Arkansas rendered its opinion holding Rule V-C unreasonable, and since there was no way in which appellant could anticipate such a

holding by said court, the federal questions were first presented in appellant's petition for rehearing. A brief in support thereof was also filed, calling the Court's attention to the violation of the Fourteenth Amendment to the Constitution of the United States. It is well settled that a federal question raised at the first opportunity presented in trial of the case through the various stages comes in due time.

The raising of a federal question in a petition for rehearing does not come too late where the state court's ruling could not have been anticipated, and petition for rehearing presented the first opportunity for raising the federal question.

Herndon v. Georgia, 295 U. S. 441.

The federal question raised in a petition for rehearing does not come too late where the grounds of the original decision below supply a new and unexpected basis for the claim, by the defeated party, of the denial of a federal right.

Great Northern R. Co. v. Sunburst Oil & Refining Co., 287 U. S. 358.

The raising of the federal question by assignment of error, even after the denial of a petition for rehearing in the highest court of the State, was permitted in **Saunders v. Shaw,** 244 U. S. 317, under a situation somewhat analogous to that in which appellant found itself in the instant case. This Court stated as follows:

> "The question remains whether the writ of error can be maintained. The record discloses the facts but does not disclose the claim of right under the 14th Amendment until the assignment of errors filed the day before the chief justice of the state granted this writ. Of course, ordinarily that would not be

enough. But when the act complained of is the act of the Supreme Court, done unexpectedly at the end of the proceeding, when the plaintiff in error no longer had any right to add to the record, it would leave a serious gap in the remedy for infraction of constitutional rights if the party aggrieved in such a way could not come here. The defendant was not bound to contemplate a decision of the case before his evidence was heard, and therefore was not bound to ask a ruling or to take other precautions in advance. The denial of rights given by the 14th Amendment need not be by legislation. Home Teleph. & Teleg. Co. v. Los Angeles, 227 U. S. 278, 57 L. ed. 510, 33 Sup. Ct. Rep. 312. It appears that shortly after the supreme court had declined to entertain the petition for rehearing the plaintiff in error brought the claim of constitutional right to the attention of the chief justice of the state by his assignment of errors. We do not see what more he could have done."

Inasmuch as the appellant perceives the sole basis of the decision in this case to be the unreasonableness of the rule, this discussion has probably been unnecessarily prolonged; but this is owing to the appellant's anxiety to point to the federal questions present under every conceivable basis for decision. If this court should entertain any doubt respecting the basis of the decision, it is expected that there will then be present a situation analogous to that encountered in Minnesota v. National Tea Co., decided by this court March 25, 1940 (84 L. ed. [Adv. Ops.] 571), and that the case will be remanded to the state court for clarification of its basis of decision.

We conclude that federal questions conferring jurisdiction in this court are present under any theory of this

case, and we urge that jurisdiction be noted and that the cause be heard for the purpose of resolving the aforesaid federal questions.

Respectfully submitted,

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